

Ethically Drafting Fair Housing Policies

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Disclaimer

- I am not providing legal advice
- This training is for educational purposes only
- For further guidance on these legal issues, please consult an attorney
- This training does not represent the policies of the Indiana Civil Rights Commission

Disclaimer #2

This course is specifically geared toward attorneys and their ethical responsibilities.



Training Goal?

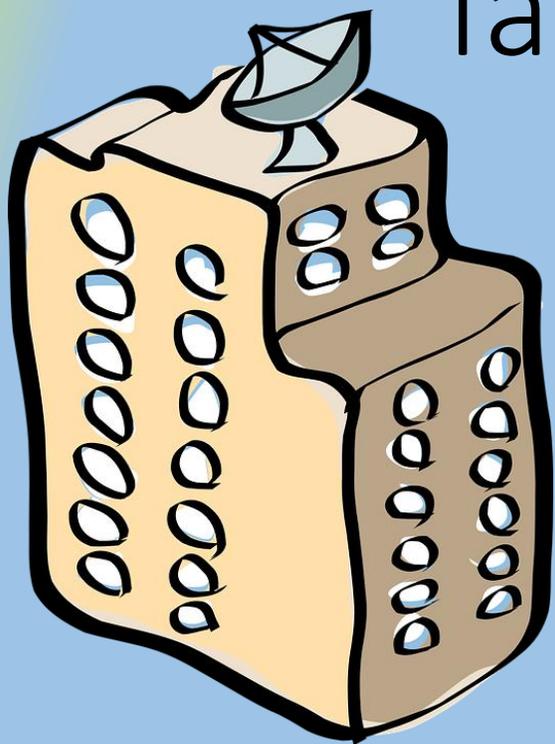
To give attendees the confidence to draft complete fair housing policies while abiding by the rules of professional responsibility.



Fair Housing Policies: Purpose



What are the benefits to housing providers of having a fair housing policy in place?



What are the benefits to tenants to having a fair housing policy in place?



As an attorney, why would you recommend that a housing provider have a fair housing policy in place?

Any reasons not to recommend a fair housing policy be in place?



Why would a housing provider seek out an attorney to draft a fair housing policy?



When is the best time to
implement a fair housing policy?



Fair Housing Policy Goals:

- Client: limit liability
- Public: Affirmatively Further Fair Housing
- Attorney:....?



Why an attorney?

“The public must have confidence that when they place their trust in an attorney they will receive faithful, professional assistance.”

Matter of McCarthy, 466 N.E.2d 442, 444 (Ind. 1984)

TRUST

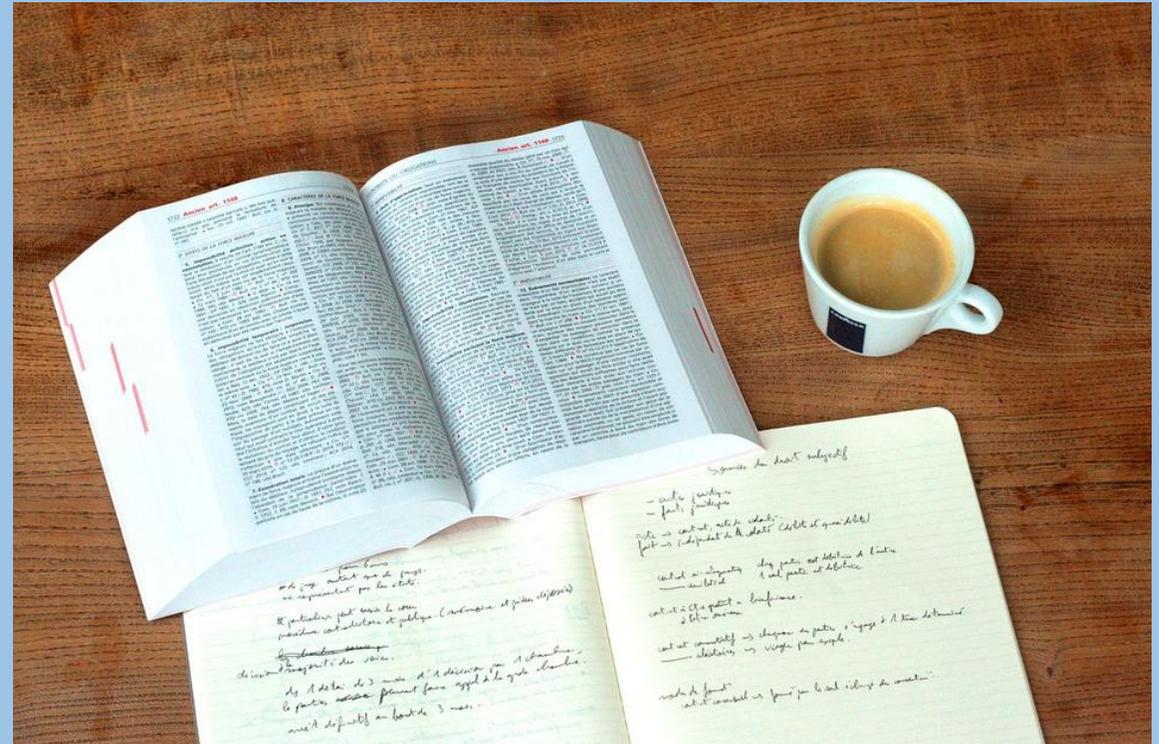
Rules of Professional Conduct:

- 1.6 Confidentiality
- 1.8 and 1.7 Conflicts of Interest
- 1.4 Communication
- 3.3 Candor Toward Tribunal
- 7.2 Advertising



Transactional Attorney v. Litigation

- Client's expectations
- Longevity of the relationship
- Prevention v. reaction



Indiana Rules of Professional Conduct

- What rules apply to transactional work?
 - 1.1: Competence
 - 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
 - 1.3: Diligence
 - 1.4: Communication
 - 2.1: Advisor

Indiana Rules of Professional Conduct

Setting Goals and Expectations:

- 1.4: Communication
- 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Drafting a Complete and Comprehensive Policy:

- 1.1: Competence
- 1.3: Diligence

Reaching Past the Policy:

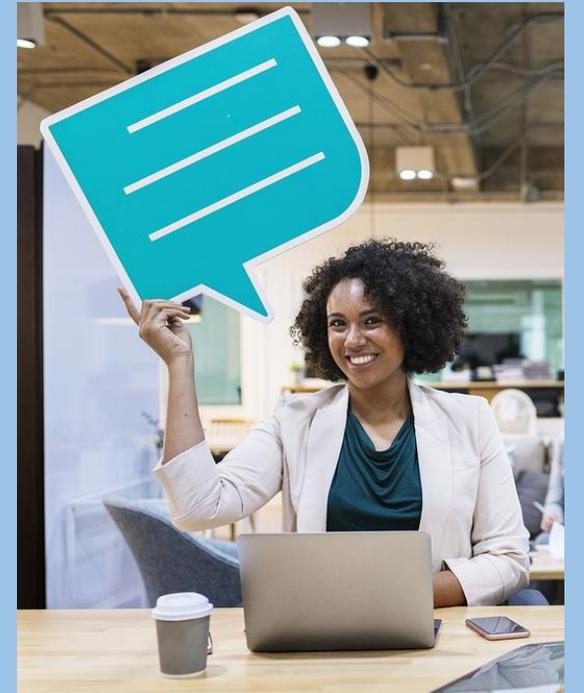
- 2.1: Advisor



1.4 Communication

- What is good communication for a transactional attorney?

“...reasonably consult with the client about the means by which the client's objectives are to be accomplished...”



1.4 Communication

In re Humphrey, 725 N.E.2d 70, 73 (Ind. 2000)

- “By failing to keep her client informed about the status of her case and by failing to advise the client of dismissals of her claims, the respondent violated Prof.Cond.R. 1.4...”

Matter of Barnes, 691 N.E.2d 1225, 1226 (Ind. 1998)

- “He violated Prof.Cond.R. 1.4(a) by failing to return his clients' phone calls or to notify them of the status of their case.”

Matter of Wilson, 672 N.E.2d 931, 932 (Ind. 1996)

- “By failing to explain the matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation, the respondent violated Prof.Cond.R. 1.4(b).”

Matter of Ragland, 697 N.E.2d 44, 46 (Ind. 1998), reinstatement granted sub nom. In re Ragland, 878 N.E.2d 198 (Ind. 2007)

- “The respondent never informed his clients that he sought withdrawal. The defendant moved for dismissal with prejudice on December 22, 1992, which the court granted on December 31, 1992, based on the respondent's failure to prosecute the action.”

1.4 Communication

- Communication includes:
 - Providing enough information that a client can make good decisions
 - Providing context to legal issues
 - Ensuring that a client understands the law and legal issues raised
 - Explain limits of policy

1.4 Communication and Fair Housing Policies

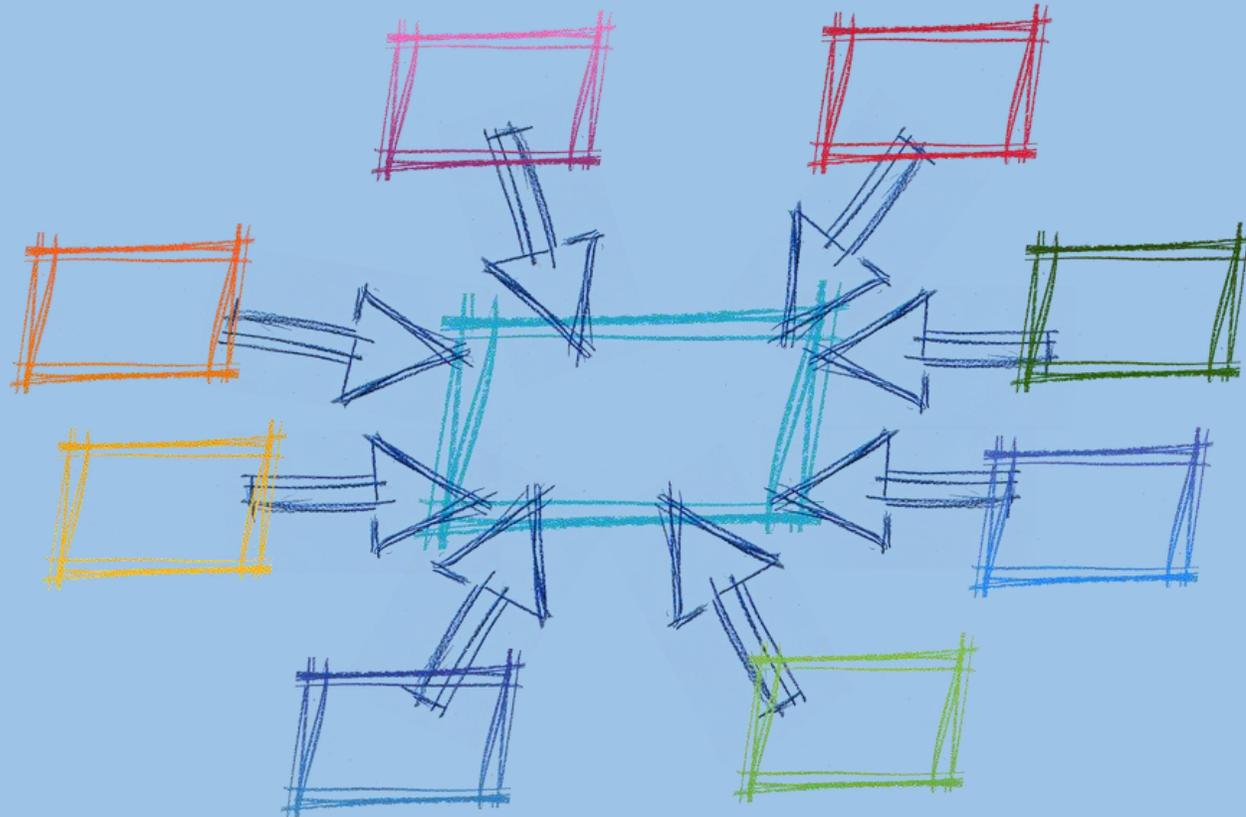
- Draft policies that reflect the law and the clients goals
- Draft policies that include additional resources
- Draft policies in the context of a complete conversation on the law

1.4 Communication

Goal Oriented and Direct

1.4 Communication: Practical Tip

- Include a purpose section in the fair housing policy that explains the goals of the fair housing policy



1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- How does scope of representation affect policy drafting?

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”



1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Matter of Anast, 634 N.E.2d 493, 493 (Ind. 1994): Criminal

- “From 1983 through January, 1991, Respondent, using his law office, conspired with others to obtain titles to motor vehicles that Respondent knew to be stolen.”
- “We further find that Respondent counselled and assisted certain clients as to how to obtain money through insurance fraud.”

Matter of Cholis, 484 N.E.2d 963, 963 (Ind. 1985): Transactional

- Cholis to retype the first page of Rodin's will which had been executed on July 2, 1982. Paul Cholis typed the substitute first page and Nicholas Cholis wrote on the bottom margin the initials “H.R.”.

1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- Counseling on an illegal action includes:
 - Assisting a client to accomplish an action that violates the law
 - Knowingly facilitating the client accomplishing an action that violates the law



1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer and Fair Housing Policies

- Draft policies with affirmatively furthering fair housing in mind
- Draft policies that reflect the law, not your client's preferences
- Converse with your client to ensure understanding
- Be willing to walk away if you cannot accomplish a **lawful** policy
- Be willing to engage in complex conversations and hold your client accountable

1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

**Knowledge
and
Assistance**

1.2 Scope of Representation: Practice Tip

- Include clean statements of law that link to other resources
 - HUD and DOJ resources
 - ICRC resources
 - Case Law
 - Journal Articles
- Do some research before drafting any policy

1.1 Competence

- Competence is always at play. What does it mean to be “Competent?”

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”



1.1 Competence

- “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”
- “Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.”
- “Competent handling of a particular matter includes **inquiry into and analysis** of the factual and legal elements of the problem, and use of **methods and procedures** meeting the standards of competent practitioners. It also includes adequate preparation.”

1.1 Competence

- Competence include:
 - Understanding your client's goals
 - Directly addressing your client's goals
 - Completely addressing your client's goals
 - Explaining the extent to which your client's goals can be met



1.1 Competence and Fair Housing Policies

- Draft policies that cover ALL relevant laws
- Draft policies that control perception and action
- Draft policies that provide guidance (resources)
- Draft reflexive policies (not just the “easy” violations)

1.1 Competence and Fair Housing Policies

COMPLETE and COMPREHENSIVE

1.1 Competence: Practice Tip

- Include all relevant law:
 - Indiana Fair Housing Act
 - Indiana Civil Rights Law
 - Indiana Administrative Code
 - Federal Fair Housing Act
- Include links to relevant resources
- Provide guidance for housing providers on how to assess their own policies

1.3 Diligence

- What does it mean to be “diligent?”



“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. ”

1.3 Diligence

Clary v. Lite Machines Corp., 850 N.E.2d 423, 432 (Ind. Ct. App. 2006)

- “an attorney's duty to his client encompasses knowledge of the law and an obligation to perform diligent research and provide informed judgments.”

Janik v. Rudy, Exelrod & Zieff, 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751, 755 (2004)

- “when rendering advice to a client, an attorney assumes an obligation to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem.”

Matter of Kelly, 655 N.E.2d 1220, 1223 (Ind. 1995), reinstatement granted sub nom. In re Kelly, 724 N.E.2d 600 (Ind. 2000)

- “In one instance, his lack of diligence destroyed his client's cause of action.”

1.3 Diligence

- Diligence includes:
 - Understanding the client's problem
 - Issue spotting for more problems
 - Researching
 - Assisting the client with long term planning
 - Ensuring that the work performed will help the client meet the goal

1.3 Diligence and Fair Housing Policies

- Draft policies that set clients up for success
- Draft policies that refer to internal and external behavior
- Draft policies that are reflexive
- Draft policies that respond to issues the attorney has noticed

1.3 Diligence

**Reflexive
and
Preventative**

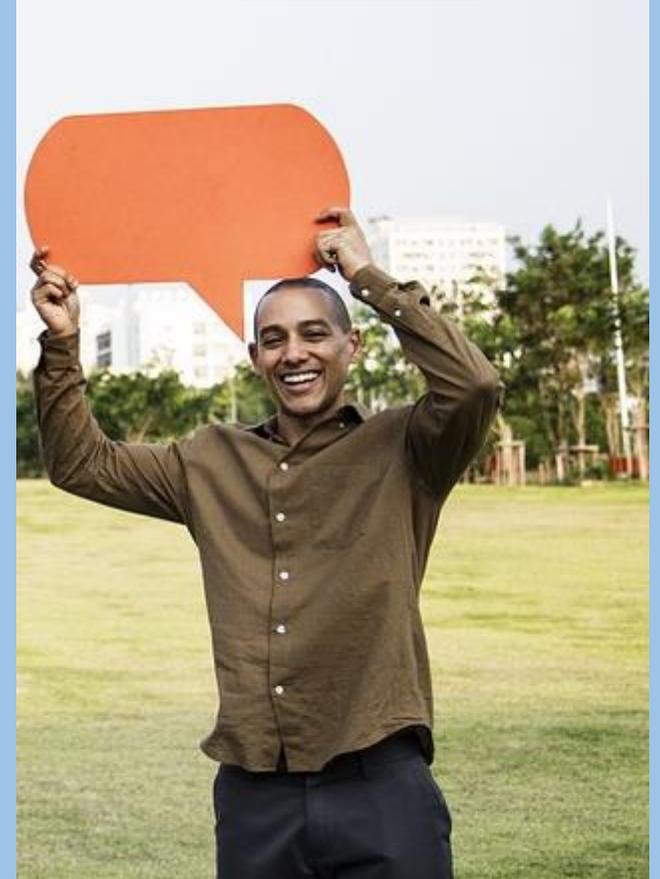
1.3 Diligence: Practice Tip

- Draft two policies: internal and external
- Provide information about how to assess policies and practices
- Have frank dialogues about issues as they come up

2.1 Advisor

- What does it mean to be an “advisor?”

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”



2.1 Advisor

- “A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront...”
- “In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation...”

2.1 Advisor

- Acting as an advisor includes:
 - Focusing on the purpose of the law to help the client understand the role of the law
 - Delving past a surface understanding
 - Issue spotting for areas that will trigger liability

2.1 Advisor and Fair Housing Policies

- Draft reflexive policies that focus on the intent and purpose of the law, not just the words
- Draft policies that serve to affirmatively further fair housing
- Draft policies informed by equity and equality
- Draft policies that do not rely on the client having a perfect understanding of the law

21. Advisor

Purpose and Depth

2.1 Advisor: Practice Tip

- Include the principles of equity and equality → these concepts are key to fair housing
- Think ahead and draft policies that can be used as guidance for more than one issue

Indiana Rules of Professional Conduct

Setting Goals and Expectations:

- Honest and open communication about what a fair housing policy can and cannot do
- Explanation of how an attorney can best help a housing provider in a transactional role

Drafting a Complete and Comprehensive Policy:

- Policies that include all law and link to resources
- Policies that issue spot for housing providers and provide skills to problem solve in the future

Reaching Past the Policy:

- Consultation and explanation that reaches past a surface understanding of a policy and conveys larger themes that can direct a housing provider's future actions

Example Policies

APT A is an equal opportunity housing provider that strives to uphold the Federal Fair Housing Act. Discrimination is prohibited under the Federal Fair Housing Act, including discrimination that results from unreasonable occupancy policies.

Accordingly, APT A will assess applicants who apply with children on an individual basis under this policy. Please ask the front desk for a complete list of the factors.

Generally, an assessment could include:

- 1) the size of the bedrooms and the unit;
- 2) the age of children;
- 3) the configuration of the unit;
- 4) physical limitations of building systems; and
- 5) applicable local, state, and federal law concerning maximum occupancy limits.

APT A will only take into account the specific applicants included on the application.

Problems?

- Only cites federal law
- Does not include any references to the factors
- Very permissive
- Not all inclusive
- No statements of purpose

APT A is an equal opportunity housing provider that strives to uphold the **Indiana Fair Housing Act**, Federal Fair Housing Act, **Indiana Civil Rights Law**, and **Indiana Administrative Code**. Discrimination on the basis of **familial status** is prohibited under the **Federal and State Fair Housing Act**, including discrimination that results from unreasonable occupancy policies. Accordingly, APT A will assess applicants who apply with children on an individual basis under this policy, **consistent with the Department of Housing and Urban Development's guidance**. APT A will consider the following factors when determining if the size of an apartment is appropriate for the applying family:

- 1) the size of the bedrooms and the unit;
- 2) the age of children;
- 3) the configuration of the unit;
- 4) physical limitations of building systems; and
- 5) applicable local, state, and federal law concerning maximum occupancy limits.

These factors are pulled directly from the Department of Housing and Urban Development's December 22, 1998 memorandum on occupancy standards by Frank Keating.

Respondent will only take into account the specific applicants included on the application and **will not consider visiting children in this analysis as tenants retain the right to allow visitors in their homes.**

{Purpose Section}

Homeowners Associations are subject to the Federal Fair Housing Act. Individual homeowners can ask the governing homeowner's association for reasonable accommodations from the covenants and for reasonable modifications to the homeowner's property. This HOA will abide by the law. Please refer to this policy for more information concerning how to make any necessary requests.

Problems?

- Not all law is mentioned
- No explanation of why the HOA is covered
- No statement of the HOA's stance
- No statement concerning fair housing policy

{Purpose Section}

Homeowners Associations are subject to the **Federal and Indiana Fair Housing Act and corresponding administrative codes** because **they govern the terms and conditions for residing in a particular neighborhood.** Individual homeowners can ask the governing homeowner's association for reasonable accommodations from the covenants and for reasonable modifications to the homeowner's property. **This HOA is deeply committed** to providing any necessary reasonable accommodations and modifications needed by residents so that **residents have equal opportunity to enjoy their homes and the services provides by this HOA.**

APT A remains committed to upholding the mandate of the Federal Fair Housing Act. APT A shall not discriminate in providing housing or housing related services on the basis of race, color, national origin, ancestry, religion, sex, handicap/disability, familial status, or other protected status.

If a tenant or applicant believes that APT A has discriminated against him or her in housing, please notify (APT A's management contact information) to see if the issue can be resolved.

Problems?

- Not all law included
- No outside resources
- Not internally instructive

APT A remains committed to upholding the mandate of the **Indiana Fair Housing Act, Indiana Civil Rights Law, and** Federal Fair Housing Act to provide equal and equitable housing opportunities. APT A shall not discriminate in providing housing or housing related services on the basis of race, color, national origin, ancestry, religion, sex, handicap/disability, familial status, or other protected status. **APT A strives to provide equal opportunities to all persons in the application process, the services provide to tenants, and the application of any other additional policies used by APT A.**

If a tenant or applicant believes that APT A has discriminated against him or her in housing, please notify (APT A's management contact information) to see if the issue can be resolved. **Applicants and tenants may also file a complaint with the Indiana Civil Rights Commission by phone (317-232-2600) or online (<https://secure.in.gov/apps/icrc/discrimination>) or may file a complaint with the Department of Housing and Urban Development by phone (1-800-669-9777) or online (https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint).**

Questions, Comments, Concerns?

